No. 02-473

Supreme Court, U.S.
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In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

LASHAWN LOWELL BANKS,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF ON THE MERITS

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ISSUE

Whether the Fourth Amendment reasonableness standard, which incorporates the common-law knock and announce rule, also incorporates the refusal component, which requires law enforcement personnel to provide the occupant with a reasonable opportunity to respond before force can be used.

The respondent, LaShawn Lowell Banks, by and through his appointed counsel, Randall J. Roske, respectfully submits his brief in answer on the merits to the Solicitor General of the United States of America's brief attacking judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 282 F.3d 699 (9th Cir. 2002). The district court's order denying respondent's motion to suppress is unreported (Pet. App. 20a-21a), as are the recommendation and report of the magistrate judge advising the district judge to deny respondent's suppression motion after evidentiary hearing (*Id*. at 22a-32a).

JURISDICTION

Respondent concedes that the request for this Court to accept jurisdiction of this case has been properly invoked under Title 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Title 18 of the United States Code Section 3109 states:

> *Breaking doors or windows for entry or exit*:
>
> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

COUNTER STATEMENT

Respondent was indicted for possession of a controlled substance with intent to distribute, a violation of Title 21 U.S.C. §841(a)(1), (count one) and with possession of a firearm as an unlawful drug user, a violation of Title 18 U.S.C. §922(g)(3). (J.A. 11-12). Respondent filed a motion to suppress the evidence obtained in violation of the Fourth Amendment and the "knock and announce" statute, Title 18 U.S.C. §3109 (J.A. 13-22). An evidentiary hearing was held by the magistrate judge who issued a recommendation and report to the district court that the respondent's motion be denied (Pet. App. 22a-32a). The district court judge thereafter denied respondent's motion (Pet. App. 20-21a). Respondent plead guilty to both counts of the indictment reserving the right to appeal the denial of his suppression

motion. Respondent was sentenced to serve 11 years and three months by the district court. A timely appeal was taken to the Court of Appeals for the Ninth Circuit. The court of appeals reversed the district court's denial of the suppression motion on Fourth Amendment grounds after careful examination of all the undisputed facts of this case (Pet. App. 1a-19a). The court of appeals recognized that the forcible entry here was made in the absence of exigent circumstances (Pet. App. 1a-8a). The court of appeals examined all relevant factors and concluded that under the facts unique to this case, the officers executing the warrant had failed to wait a sufficient amount of time before inferring a refusal of admittance. *Id.*

1. The facts adduced below are as follows:

Sometime in early July of 1998, a joint state and federal drug task force (the North Las Vegas Federal Drug Task Force) received word from a confidential informant that a person known as "Shakes" was selling cocaine and the informant believed he could make a controlled purchase (J.A. 24). The informant related that "Shakes" lived at 1404 Henry Drive, apartment D, in Las Vegas, Nevada. *Id.* Officer Crespo of the North Las Vegas Police Department arranged for $200 from the narcotics buy fund to have the informant make a controlled buy. He then searched the informant for money and drugs before supplying the $200 to the informant (J.A. 25). Officer Crespo then drove him to the 1404 Henry Drive apartment. *Id.* The informant then went into apartment "D" and returned a short while later with two large off-white rocks of cocaine. The informant identified the seller as "Shakes." (J.A. 24). No further identifying information was provided. *Id.*

Officer Crespo sought a search warrant for 1404 Henry Drive, apartment D on July 8, 1998 (J.A. 23-27). This warrant was authorized by the justice of the peace on the same day. The warrant described the premises to be searched as an upstairs apartment in a four apartment building (J.A. 23).

On July 15, 1998, at 2 p.m. the members of the joint task force assembled to raid respondent's apartment (J.A. 73-74). Officer Crespo, along with members of the SWAT team, were stationed at the entrance to apartment D (J.A. 73). The members of the SWAT team were wearing tactical assault garb, including hoods or masks to disguise their identity (J.A. 80). The entry team was armed with fully automatic weaponry (J.A. 79-80). FBI Agent Tomasso was stationed at the rear of the apartment building and apparently could hear the entry team (J.A. 97). The officers executing the warrant did not know whether anyone was in the apartment (J.A. 48). Officer Crespo knocked loudly and announced "Police, search warrant" in a loud authoritative tone (J.A. 75). Officer Crespo did not hear anything back. *Id.* Officer Crespo waited "at least 15 seconds" before ramming open the apartment door. *Id.* FBI Agent Tomasso, who was stationed at the rear of the apartment, opined that the time interval was "I think twenty seconds, maybe." (J.A. 97). When the door flew open, respondent was found wet, soapy and naked a few steps from the bathroom (J.A. 76).

Respondent testified that he was taking a shower when he heard a loud "boom." (J.A. 124-125). He heard no knock or announcement, but did hear a loud noise of the battering ram (J.A. 125). He turned off the water and stepped out of the bathroom when in came rushing masked men in black outfits armed with guns (J.A. 135). Respondent was immediately proned out, face down by an armed man. He did not know whether the man was a robber or a police officer (J.A. 143).

Thereafter, respondent was handcuffed and taken naked to the kitchen table for interrogation (J.A. 125). Meanwhile, the SWAT team conducted the search of his apartment (J.A. 92-93). Drugs, weapons and other evidence were located in respondent's apartment. Respondent was the sole occupant of apartment D, at the time of the execution of the search warrant.

2. A majority of the judges acting as a three judge panel reversed the district court's denial of respondent's motion to suppress.[1] The majority opinion was written by Judge Henry A. Politz, a senior judge of the Fifth Circuit Court of Appeals sitting by designation in the Ninth Circuit Court of Appeals (Pet. App. 1a-19a).

The Ninth Circuit Court cited four general categories of knock and announce cases (see Pet. Br. at 5). Petitioner states: "The majority set forth four categories of knock and announce cases, each requiring a different period of delay before an officer may enter a residence after knocking and receiving no response." In the decision below, *United States v. Banks*, 282 F.3d 699 at 705, (9th Cir. 2002), (App. 5a) the court stated:

> (1) entries in which exigent circumstances exist and non-forcible entry is possible, permitting entry to be made simultaneously with or shortly after announcement; (2) entries in which exigent circumstances exist and forced entry by destruction of property is required, necessitating more specific

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[1] The suppression motion raised Fifth and Sixth Amendment issues which were rejected by the court of appeals, and are not the subject of the case before this Court.

> inferences of exigency; (3) entries in which no exigent circumstances exist and non-forcible entry is possible, requiring an explicit refusal of admittance or a lapse of a significant amount of time; and (4) entries in which no exigent circumstances exist and forced entry by destruction of property is required, mandating an explicit refusal of admittance or lapse of an even more substantial amount of time.

The majority in *Banks* did not refer to the four basic categories as setting "a different period of delay before an officer may enter a residence after knocking and announcing and receiving no response" as argued by the petitioner (See Pet. Br. at 4). The majority referred to the consideration of the four basic categories as "aids in the resolution of the essential question whether the entry made herein was reasonable under the circumstances" under Title 18 U.S.C. §3109 (See *Banks* 282 F.3d at 705; App. 6a). The majority explicitly noted "'there are no set rules as to the time an officer must wait before using force to enter a house; the answer will depend on the circumstances of each case'" [See, *Banks* at 704-705; App 5a; c.f. *McClure v. United States*, 332 F.2d 19, 22 (9th Cir. 1964)]. The "four categories of entries" under Title 18 U.S.C. §3109 referred to by the majority in *Banks* are distilled from the case of *Bustamonte-Gamez*, 488 F.2d 4, 9 (9th Cir. 1973), and is an effort to take into account the interests served by Title 18 U.S.C. §3109 in "(a) reducing the risk of harm to both the officer and the occupants of the house to be entered; (b) helping to prevent the unnecessary destruction of private property; and (c) symbolizing respect for individual privacy summarized in the adage that 'a man's home is his castle.'" *Banks*, 282 F.3d at 705; App. 5a, citing *Bustamonte-Gamez*, 488 F.2d 4, 9 (9th Cir. 1973), quoting *Miller v. United States*, 357 U.S. 301, 307, 2L.Ed.2d 1332, 78 S.Ct. 1190 (1958).

The majority in *Banks* noted that the officer's entry was made after knocking and announcing their authority and purpose. The question presented in *Banks* is whether the officers could reasonably infer a refusal of admittance from the passage of a mere 15-20 seconds under a totality of the circumstances surrounding the execution of the warrant (See, *Banks*, 282 F.3d at 705; App. 7a).

The majority in *Banks* concluded, after a careful examination of the record, no exigent circumstances existed (see, 282 F.3d at 704, ft.nt. 3; App. 6a). Exigent circumstances exist when "'there [is] a likelihood that the occupants [will] attempt to escape, resist, destroy evidence, or harm someone within . . . '" [Id., c.f. *United States v. McConney*, 728 F.2d 1195, 1204-05 (9th Cir. 1984) (en banc opinion)]. The petitioner notes the *Banks*' majority's conclusion that no exigent circumstances specific to the case existed. The *Banks* majority opinion articulated a series of nonexclusive factors to determine whether, under the totality of the circumstances, the duration of the officer's pause was reasonable (282 F.3d at 704; App. *infra* 6a-7a). These factors are:

> (a) size of residence; (b) location of the residence; (c) location of the officers in relation to the main living areas of the residence (d) time of day; (e) the nature of the suspected offense; (f) evidence demonstrating the suspect's guilt; (g) suspect's prior convictions and, if any, the type of offence for which he was convicted; and (h) any other observations triggering the senses of the officers that reasonably would lead one to believe that immediate entry was necessary. (*Id*. App. 6a-7a).

The majority opinion in *Banks* conducted the following analysis:

In the case before us, the officers knocked once and announced their purpose. The officers heard no sound coming from the small apartment that suggested that an occupant was moving away from the door, or doing anything else that would suggest a refusal of admittance. We know from the record sounds were transmitted relatively easily for [FBI Agent] Tomasso, waiting outside at the rear of the apartment, heard Officer Crespo's knock at the front door. Yet none of the officers testified that they heard any sound coming from within the apartment. There was nothing else that triggered the officers' senses, and there were no exigent circumstances warranting a waiver of the reasonable delay. The officers had no specific knowledge of any facts or reasonable expectations from which they could reasonably have believed that entry into Banks' residence would pose any risk greater than the ordinary danger of executing a search warrant on a private residence.

Because the officers were not affirmatively granted or denied permission [to enter], they were required to delay acting for a sufficient period of time before they could reasonably conclude that they impliedly had been denied admittance. After pausing a maximum of fifteen to twenty seconds, the officers forced entry. Banks came out of his shower upon hearing the sound of his door being forced open, and stumbled into the hallway concerned that his apartment was being invaded. Upon entering, the officers found Banks naked, wet and soapy from his shower. Under these circumstances, we are not prepared to conclude that the delay of fifteen to twenty seconds after a single knock and announcement before forced entry was, without an affirmative denial of admission or other

exigent circumstances, sufficient in duration to satisfy the constitutional safeguards.

Banks, majority opinion, 282 F.3d at 705-706; App. *infra* 7a-8a). Several facts not mentioned by the majority opinion, are that the officers had no knowledge of any other occupant of the apartment, except the person identified as "Shakes," and that at the time of the warrant's execution the officers were apparently unsure of whether anyone was, in fact, home. There was no evidence adduced that surveillance was established anytime except just prior to the warrant's execution.

The petitioner concedes that the majority opinion in *Banks* "did not indicate how much delay before entering was necessary to satisfy the Fourth Amendment." (Pet. Br. 7). The dissenting judge, Judge Fisher, in his opinion, criticized the majority opinion in *Banks* as neglecting to address all of the factors it identified as relevant to the inquiry. Judge Fisher was referring to the nonexclusive list of factors set forth by the majority opinion. 282 F.2d at 705; App. *infra* 14a-19a). Judge Fisher specifically identified, as "discounted factors:" (a) [the] size of the residence;" "(c) location of the officers in relation to the main living or sleeping areas of the residence;" and "(e) [the] nature of the suspected offense." Judge Fisher, in his dissent, admits "this case is a close call" and acknowledges "it is disquieting to visualize Banks' shock and embarrassment as he emerged naked and still soapy from his shower and confronted the officers who had just burst through his front door." (282 F.3d at 707; App. *infra* 11a). The dissenting judge's claim that the majority opinion failed to give weight to the factors identified as the size of the residence, location of the officers and the nature of the offense is offset by the other facts specific to *Banks*. Even in a small apartment, an individual who is in the shower or using the

bathroom cannot be *reasonably* expected to answer the door in twenty seconds or less. Law enforcement officers set the timing of their raids. They are calculated to take the occupants (or here the sole occupant) off guard.

It is conceded by Judge Fisher in his dissent that, "there is no Ninth Circuit precedent directly on point," (282 F.3d at 709; Pet. App. 16a). The dissenting judge then cites cases outside the controlling circuit, to justify entries anywhere from 10 to 20 seconds after the knock. Without addressing each case here individually, these cases all have significantly different fact patterns making them distinguishable from the case at bar. Petitioner has seized upon Judge Fisher's comment that the majority's opinion provides no meaningful guidance to law enforcement officers (Pet. Br. 7). This Court's cases teach that there are no set rules for what is a reasonable delay under the Fourth Amendment principles. Where the police are confronted with no explicit refusals of admittance by a sole occupant of a dwelling, it is necessary for them to pause to consider that the person may be engaged in a private activity which society recognizes would prevent an immediate response to the door.

A. The *Banks* Majority Opinion is Consistent With This Court's Precedent.

The decision of the majority in *Banks* does not create a "rigid," "categorical scheme" to Fourth Amendment analysis as claimed by Petitioner (Pet. Br. 7). The "four categories" identified in the majority opinion in *Banks* are intended to be "aids in the resolution of the essential question whether the entry made herein was reasonable under the circumstances." (*Banks*, 282 F.3d at 704; App. *infra* 5a-6a). The guidance offered by the *Banks* majority was merely an analytical distillation of cases interpreting the interests served by the

knock and announce statute, Title 18 U.S.C. §3109 (*Banks*, 282 F.3d at 705; App. *infra* 6a). The petitioner overstates the significance of the guidelines and glosses over the fact that the majority opinion utilized a *totality of the circumstances* test to determine reasonableness under Fourth Amendment standards (*Banks*, 282 F.3d at 705; App. *infra* 6a). There is nothing in the *Banks* opinion which mandates a rigid rule of announcement in derogation of this Court's opinion in *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) (Pet. Br. 8). In *Wilson*, this Court addressed the Arkansas Supreme Court's finding that there is no authority for the proposition that the common law knock and announce principle formed a part of the Fourth Amendment reasonableness inquiry. In *Wilson*, this Court was presented with a state court prosecution predicated on evidence seized on a search warrant executed by the police. The facts there involved an informant who made a series of purchases of drugs from Ms. Wilson. On the last drug buy, Ms. Wilson waved a gun in the informant's face and threatened to kill her if she was working for the police. Search warrants were obtained and the police executed the warrant without making any knock and announcement. After entering, the police found Ms. Wilson in the bathroom flushing drugs down the toilet. Ms. Wilson filed a motion to suppress claiming, among other things, that the officers executing the warrant failed to knock and announce their purpose. This Court, in a unanimous opinion, authored by Justice Thomas, reversed the Arkansas Supreme Court's affirmance and remanded the matter for determination below whether the search might be constitutionally defective or if law enforcement interests may establish the reasonableness of an unannounced entry. *Wilson,* 514 U.S. at 936. The remand was made despite the State of Arkansas, and the Solicitor General's argument that the record sufficiently justified the entry because of the reasonable belief, by the officers, that a prior announcement would place them in peril and the

potential that evidence would be destroyed (*Wilson*, 514 U.S. at 937).

The respondent argues that "by making the amount of time that officers must wait vary according to whether execution of a warrant requires property damage" is at odds with this Court's decision in *United States v. Ramirez*, 523 U.S. 65, 71 (1998) (Pet. Br. 8). First, to the extent that the majority opinion in *Banks* refers to a guideline addressing absence of property damage, the holding does not turn on this factor because *Banks* involves the damage of property. The distinction made in the "Guidelines" discussed by the majority opinion in *Banks* does not necessarily place the decision at odds with this Court's decision in *Ramirez*. This Court's decision in the *Ramirez* case teaches that the Fourth Amendment does not hold officers to an enhanced or higher standard of showing of exigent circumstances where a "no knock" entry results in the destruction of property. 523 U.S. 65 at 71. The insistence on a heightened showing of exigency was the basis of the decision by the court of appeals that the fruits of the search were a result of a Fourth Amendment violation. In *Ramirez*, the Chief Justice delivered a unanimous opinion of the Court. The *Ramirez* case involved a police search for a violent escapee who was believed to be at the Ramirez residence. The escapee, according to an informant, had guns and drugs stashed in the garage. The Chief Justice, speaking for this Court, rejected the notion that a heightened standard of exigency applies to a no knock if the entry requires destruction of property. The instant case addresses a different issue under Title 18 U.S.C. §3109, which is whether under the totality of the circumstances the officers paused sufficiently before inferring a refusal of admittance. The *Ramirez* case involved particularized facts which the officers used to form a reasonable suspicion that knocking and announcing would be "dangerous" and

"destructive" to the purposes of the investigation. However, to the extent the "Guidelines" cited in *Banks* are at odds with the *Ramirez* decision, they are *dicta*. The Guidelines in *Banks* do not affect the outcome of the case, and the over-arching question which is: whether the officer had paused sufficiently under a reasonableness standard of the Fourth Amendment before making a forcible entry. This is because in *Banks*, there were no exigent circumstances present. There were no facts giving rise to a particularized suspicion "heightened" or not.

The "four categories" pointed out by the *Banks* court is an effort by the Ninth Circuit to classify the various kinds of entries by police and require a higher standard of exigencies where destruction of property occurs, and there is a claim of a knock and announce violation. This is the Ninth Circuit Court's effort to give a higher meaning to the Fourth Amendment, and the knock and announce rule which it incorporates. This analysis does not explicitly reference the common-law at the time of the adoption of the Constitution. Nonetheless, the Ninth Circuit has attempted to strike a balance between the needs of law enforcement, while at the same time, according the kind of core protections that existed at common-law.

In *Wilson v. Arkansas*, 514 U.S. 927 (1995), Justice Thomas, speaking for a unanimous court, held that "the common law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment." (514 U.S. at 927). In *Wilson*, the issue at bar was whether the "knock and announce" rule is constitutionally mandated by the Fourth Amendment. Justice Thomas used a historical analysis to come to the conclusion that the knock and announce rule was a well established principle at common-law. In one of the earliest reported cases at the King's Bench

(1603), *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194-196, the knock and announce rule is cited as well established principle of common-law. In *Wilson*, Justice Thomas referred to the *Semayne's* case as restating an already well established common-law rule requiring a knock and announcement before a breaking or destruction of a dwelling can occur. "But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors. . . ., for the law without a default in the owner abhors the destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensure to the party, when no default is in him; for perhaps he did not know the process, of which, if he had notice, it is presumed that he would obey it. . ." Ibid, 77 Eng. Rep. at 195-196. *Wilson*, 514 U.S. at 931-932, 115 S.Ct. at 1916-1917, 131 L.Ed2d at 981. Justice Thomas "looked to the traditional protections against unreasonable searches and seizures afforded by common law at the time of the framing" to determine the scope of the Fourth Amendment. *Wilson*, 514 U.S. at 931, 115 S.Ct. at 1916, 131 L.Ed2d at 981. Justice Thomas noted that the knock and announce rule finds its earliest reference in a statute enacted by Parliament in 1275 which was apparently a restatement of the established law common to all England. [3 Edw.I, ch 17, in the Statutes at large from Magna Carta to Hen 6 (O. Ruffhead ed. 1769); (*Wilson Id.* At ft.nt 2)].

Justice Thomas in *Wilson* also quoted *Lee v. Gansell*, Lofft 374, 381-382, 98 Eng. Rep. 700, 705 (K.B. 1774) for the proposition that "'as to the outer door, the law is now clearly taken' that it is privileged; but the door may be broken 'when the due notification and demand has been made **and refused**.'" (Emphasis supplied). *Wilson,* 514 U.S. at 932, 115 S.Ct. at 1917, 131 L.Ed 2d 981. The clearly established rule at common law was that a knock and announcement were

required, and further, that a refusal was also required before a breaking could be made. Sir Matthew Hale (as noted by Justice Thomas in *Wilson*) wrote the "'constant practice' at common law was that 'the officer may break open the door, if he be sure the offender is there, if after acquainting them of the business, the demanding the prisoner, he refuses to open the door.'" (514 U.S. at 932, 115 S.Ct at 1917, 131 L.Ed 2d at 981).

The problem which the lower courts have been left to struggle with is this; the *Wilson* court found that the notice requirement of the knock and announce rule to be incorporated into the Fourth Amendment reasonableness standard, but no guidance as to the refusal component was provided. Therefore, lower courts generally, have been left on their own to attempt to determine where the balance should be struck where the notice requirement has been complied with, and an almost contemporaneous entry is made. This has resulted in many lower courts using a "stopwatch approach" upholding entries where no refusal occurs. For instance, the Seventh Circuit in *United States v. Markling*, 7 F.3d 1309 (7th Cir. 1993) has upheld a forced entry of a motel room in as little as seven seconds between the announcement. In *United States v. Knapp*, 1 F.3d 1026 (10th Cir. 1993) a forcible entry was made on a residence where the elapsed time between announcement and entry was between 10 and 12 seconds, even though the occupant of the home was an **amputee**. In *Knapp*, the Tenth Circuit cited approvingly, a District of Columbia case, *United States v. Ruminer*, 786 F.2d at 383-384 upholding a forcible entry after announcement in a mere "five to ten seconds." In *Wilson*, the Solicitor General opposed in the recognition that the Fourth Amendment reasonableness standard as incorporating the knock and announce requirements. In this case the Solicitor General desires to eviscerate fundamental Fourth Amendment rights by having

this Honorable Court render the refusal component of the knock and announce rule to meaningless ceremony (i.e., knock, announce, break and enter). If law enforcement can knock and announce without pausing for a meaningful period of time before breaking and entering, then the knock and announce rule can be rendered a complete nullity.

Law Professor, Traci Maclin, has carefully analyzed this Court's decisions applying the lessons of history in the area of the Fourth Amendment. Professor Maclin notes that in *Wilson*, the Court was silent on the refusal component of the common law knock and announce rule. 82 B.U.L. Rev. at 909.[2] Professor Maclin however, noted that the *Wilson* court was not strictly required to address the refusal component of the knock and announce rule, under the facts of that case. Professor Maclin wisely commented that:

> severing the refusal component from the notice component defeats the purpose behind the rule. The goals of the announcement rule-minimizing the chance of violence, protecting the home's privacy, and preventing unnecessary physical damage to the home will not be achieved if the homeowner is not given a reasonable opportunity to open his front door. Both halves of the rule must be followed to achieve its constitutional goals.
> 82 B.U.L. Rev. at 907-908.

Professor Maclin also points out that in his research at the time of the framing of the Constitution, American law

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[2] Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged. 82 B.U.L. Rev. 895 (October 2002).

recognized **no** exceptions to the announcement rule, even for cases involving officer safety or destruction of evidence (82 B.U.L. Rev. at 912-193). Yet, the *Wilson* decision discusses the knock and announce rule as a flexible rule where "in some circumstances an officer's unannounced entry into a home might be unreasonable." *Wilson*, 514 U.S. at 934, 115, S.Ct. at 1918, 131 L.Ed2d at 982. This proposition emboldens the Solicitor General to believe that this Court is prepared to make the rule's enforcement the exception, and its exceptions, the rule. Yet, this is not what the law common to all England was at the time the Constitution was framed, and it was not the law of our land in its infancy. The Solicitor General, on behalf of law enforcement, seeks to tip the balance of the scales of justice heavily in their favor. We are perilously close to losing the very fundamental rights envisioned by the founding fathers for posterity. What is at stake here are the rights of every citizen, not just the next seven years of a young black man's life. In those cases where law enforcement must knock and announce, must they pause a reasonable period of time before breaking and entering? The sad truth is that there are a significant number of dwellings searched in error. The rule of pausing may provide just the additional measure of time to prevent an innocent occupant from being subjected to a domestic variation of state sponsored terrorism. Stories in the media of innocent citizens being terrorized by erroneous searches demonstrate this. In Boston, a retired reverend's home was erroneously searched by law enforcement who sufficiently terrorized the man that the died of a heart attack.[3] The common use of "SWAT" police teams

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[3] In Boston, Massachusetts, on March 26, 1994, 13 heavily armed SWAT team officers slammed down the door of retired Reverend Accelynne Williams and chased him through his home. The 75 year old Reverend fled into the bedroom where the

(as was the case in *Banks*) adds the new dimension of terror in the way law enforcement conducts its business. This use of ski masks to hide the identity of the intruders does nothing to protect the officers, but what it does accomplish, most effectively, is to strike terror in the hearts of men. In *United States v. Becker*, 23 F.3d 1537 at 1549 (9th Cir. 1994), that court stated more eloquently that this author could, that:

> The protection offered by the Fourth Amendment and by our law does not exhaust itself once a warrant is obtained. The concern for privacy, the safety, and the property of our citizens continues and is reflected in the knock and announce requirements. It finds

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police followed him in hot pursuit and knocked in that door. The Reverend was cuffed and was so traumatized by the ordeal that he began vomiting. He later died of heart failure. The officers were in possession of a no knock search warrant for drugs and had mistakenly raided the Reverend's apartment and not the apartment one floor above. No drugs were found. (See, *The Boston Globe*, Sunday Edition, March 27, 1994.) In a follow up article critical of the police procedures, it was pointed out that had the Reverend survived, the matter would have gone unnoticed.

Another erroneous search which did garner media attention in Sixty Minutes, was the case of Don Carlson, an executive for a Fortune 500 company. On the night of August 25, 1992, Mr. Carlson was asleep when narcotics officers made an unannounced entry. Mr. Carlson heard the intrusion and called down the hall "Who's there?" Receiving no answer, and aware intruders were present, he tried calling 911. Then he went for a hand gun and shot it toward the door. Fire was returned and Mr. Carlson was shot in the leg. He staggered back to his bedroom and collapsed. He was shot two more times, then taken into custody. A search of his home revealed no drugs. CBS News, *60 Minutes*, Vol. XXV, No. 27, at 6-7 (Mar. 28, 1993).

> expression in the knock and announce statute . . .
> The fear of smashing in the doors by government agents is based upon much more than a concern that our privacy will be disturbed. It is based upon the concern for our safety and the safety of our families. Indeed, the minions of dictators do not kick the doors for the mere purpose of satisfying some voyeuristic desire to peer around and go about their business. Something much more malevolent and dangerous is afoot when they take those actions. It is that which strikes terror into the hearts of their victims. The Fourth Amendment protects us from that fear as much as it protects our privacy.

In *Banks*, a search was conducted in the afternoon. In most communities it might be surmised that its citizens would be awake. Yet, Las Vegas is known the world over as a "twenty four hour" town. Private activities such as bathing, showering, sleeping and the like, can occur at any hour of the day. Another core purpose served by a meaningful pause between announcement and entry is that it provides the occupant an opportunity to avoid suffering from unnecessary public exposure of private activities. Here, Mr. Banks was showering, an activity almost anyone would consider private. In *McDonald v. United States*, 335 U.S. 451, 460,61, 69 S.Ct. 191, 93 L.Ed. 153 (1948), Justice Jackson noted that requiring officers to wait following their announcement may well permit some persons to put their affairs in order. For Mr. Banks this would have at least afforded him the opportunity to maintain some shred of dignity when confronting the officers.

The Solicitor General, in his brief, asserts that *Banks* creates uncertainty as to how much additional delay is "sufficient" to satisfy constitutional safeguards of the Fourth

Amendment (Pet. Br. 8). The Solicitor General also complains that the *Banks* decision creates a "rigid, complex, and confusing scheme." (Id.) However, the common-law knock and announce rule is a model of simplicity and predictability. At common-law, law enforcement officers were required to pause until a refusal occurred. This meant perhaps repeated announcements were necessary before a refusal was obtained. Clearly, this kind of predictability is not desired by the Solicitor General or law enforcement, whose chief concern is the most efficient enforcement of the penal statutes. Yet, as a free society we must have constitutional constraints on police power, or we will find our failure to heed the lessons of history the creation of a home grown police state. The refusal component of the common-law knock and announce rule provides the appropriate protection for privacy concerns. As Professor Maclin notes, it is the missing half of the knock and announce rule, that gives meaning to the whole.

The *Banks* decision is in harmony with *Richards v. Wisconsin*, 520 U.S. 385, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997). In *Richards*, this Court was confronted with a state court sanctioned blanket exception to the knock and announce requirement under common-law principles. In *Richards*, the police executed a search warrant on a motel room in connection with a drug investigation. The State Supreme Court adopted a *per se* rule that police officers are never required to knock and announce when executing a warrant in a felony drug investigation. The rationale for this rule of the State Supreme Court was based upon generalizations about "today's drug culture." Justice Stevens delivered the unanimous decision of this Court, while affirming that under facts specific to the case, held that there was no constitutional violation, this Court reaffirmed the principle that *specific* information of exigent circumstances may justify dispensing

with the knock and announce rule, generalized concerns of dangerousness or destruction of evidence do not. 520 U.S. at 392. This Court in *Richards*, reaffirmed the need for *case by case* evaluation of the manner in which a search is conducted. Justice Stevens in footnote 4 stated:

> It is always somewhat dangerous to ground exceptions to constitutional protections in the social norms of a given historical moment. The purpose of the Fourth Amendment's requirement of reasonableness "is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted - - even if a later, less virtuous age should become accustomed to considering all sorts of intrusion 'reasonable.'" *Minnesota v. Dickerson*, 508 U.S. 366, 380, 124 L.Ed.2d 334, 113 S.Ct. 2130 (1993) (Scalia, J., concurring). 520 U.S. at 393.

A reading of the *Richards'* case reflects that it was the state and petitioner who were urging this Court to adopt a rigid rule or blanket exception dispensing with the knock and announce rule in felony drug investigations. Before leaving the *Richards* case, an analysis of the privacy interests served by the knock and announce rule is setforth in footnote five of the *Richards* opinion, Justice Stevens pointed out:

> when police enter a residence without announcing their presence, the residents are not given any opportunity to prepare themselves for such an entry . . . [t]he brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed.

520 U.S. at 393. This same privacy concern is given meaning by the requirement that the searching officers are to pause a reasonable period of time before inferring a refusal of admittance.

Petitioner argues that the *Ramirez* case holds that the lawfulness of an entry does not depend on a special showing of "reasonable suspicion" where property is destroyed to effectuate a no knock entry and that it "follows that the prospect of property destruction does not require additional delay in the circumstances presented here." (Pet. Br. 12). This issue has not been squarely addressed by this Court. The *Ramirez* case addressed the issue of whether a heightened showing of exigent circumstances or reasonable suspicion is necessary to justify a "no knock" destructive entry. The *Banks* majority opinion did not address the issue of reasonable suspicion justifying a shortened pause between the announcement and the forcible entry. In *Banks*, *no* reasonable suspicion of exigent circumstances was found to be present. No particularized fact existed, which justified a hastened entry in *Banks*. Only generalized concerns for officer safety and destruction of evidence were the driving factors in the officers' decision to effectuate a forcible entry in 20 seconds or less. These generalized concerns were the same ones rejected by this Court in *Richards* as a basis to dispense with the knock and announce requirement in all drug cases. The petitioner strains to make the *Banks* case the *Ramirez* case. They involve two different issues of fact, (and law) under knock and announce principles.

B. The *Banks* Decision Presents a Fact Specific Resolution of What Constitutes a Reasonable Pause Before Making a Forcible Entry. The *Banks* Decision Does Not Create an Inflexible Rule in Derogation of the Reasonableness Inquiry.

Petitioner argues that the *Banks* majority opinion conflicts with the decisions of this Court, and other circuit courts by creating an inflexible rule supplanting the reasonableness standard (Pet. Br. 12). This is not so. The *Banks* majority opinion is based upon the unique matrix of facts presented in the case. The case does not establish any set times for law enforcement to pause, it simply found that under the totality of the circumstances presented in this case, that the 20 second or less pause between announcement and forcible entry was not reasonable. The "Guidelines" in the *Banks* case, even if rejected by this Court, should not alter the result.

In *Banks*, the officers were executing a search warrant in a drug investigation. The apartment in question was occupied by only one person. While the search of the two bedroom upstairs apartment occurred at two in the afternoon, the officers executed the warrant at a time when Mr. Banks was taking a shower. Las Vegas is known as a twenty four hour town, citizens could be sleeping or bathing at any hour of the day. No particularized suspicions of exigent circumstances were known to the officers, and no affirmative refusal of entry occurred. Mr. Banks testified that he heard no knock and announcement just the loud noise of the door being rammed open. None of the cases cited by the petitioner present these unique set of facts. Since the totality of the circumstances takes into account facts not found in other circuit court opinions, there is no actual "conflict" with other circuit courts' holdings.

The petitioner claims that the "Guidelines" setforth in *Banks* create a rigid framework which removes the flexibility of the reasonableness standard of the Fourth Amendment (Pet. Br. 12). The petitioner glosses over the factual analysis in *Banks*, which embodies the very essence of a case by case analysis by the majority. The "Guidelines" again, are *dicta*, and are not required to uphold the particularized analysis given to the facts by the majority. The totality of the circumstances test was a basis for holding the officers were acting unreasonably by pausing a mere 15 to 20 seconds before battering down the door.

The Solicitor General acknowledges that the *Banks* court characterized the "Guidelines" as "aids in the resolution of the case," not a substitution for a reasonableness inquiry (Pet. Br. 13). The Solicitor General claims the "Guidelines" constitute a judicial straight jacket for determining reasonableness. The cited example is that the police would be forced to wait additional periods of time at a barricaded door where security bars are installed on a home and where no exigent circumstances exist (Pet. Br. 14). There were no security bars on Mr. Banks' apartment.

The argument is creative, but has little or nothing to do with the case at bar. Again, even if this Court decides the "Guidelines" are unhelpful, misguided or just wrong, this should not affect the ultimate conclusion that under the facts in *Banks*, that the officers failed to pause long enough. Simply put, a person in the shower soapy and dripping wet, needs more than a mere 15 to 20 seconds to reasonably respond to a knock and announcement.

The Solicitor General's claims that *Banks'* case makes the officers engage in "senseless ceremony" where a building is, for example, empty (Pet. Br. 14). The argument is

unpersuasive. If the building is truly empty, a failure to knock and announce will not be litigated. To have standing to assert a knock and announce violation, the person must be present when the search is executed. *United States v. DeLutis*, 722 F.2d 902 (1st Cir. 1983) and *United States v. Lockett*, 919 F.2d 585 (9th Cir. 1990).

Second, if the officers truly believe the premises are unoccupied, their concerns for safety, escape and destruction of evidence vanish. Any pause by a constable erring on the side of caution hurts no one. What the Solicitor General really desires this Court to do is have it abdicate its traditional role as the overseer of police procedures, and defer "to the discretion of the executing officers to determine how best to proceed . . . " (Pet. Br. 15). Should this Court abandon its role as the supervisor of the administration of criminal justice and procedure, then important constitutional safeguards will all but disappear.

The Solicitor General also attacks the Ninth Circuit's "Guidelines" emphasis on property damage as it relates to the period officers must delay before entry (Pet. Br. 16). The breaking of a door presents the archetype evil the knock and announce rule is designed to prevent. In response the Ninth Circuit created "Guidelines" which require a more meaningful interval of time between the knock and announce and the forcible entry. As noted above at common-law, the knock and announce rule contemplated an overt refusal before destruction of property would be sanctioned.

The Solicitor General aptly points out that the *Ramirez* decision rejects heightened standards of exigent circumstances (Pet. Br. 17). But again, it must be recalled that the record in *Banks*, is that there were no exigent circumstances and no refusal. The whole argument of this section of the brief of the

Solicitor General addresses what is *dicta*. Take away the reference in *Banks* to the "Guidelines," and what is left is the constitutionally correct result.

Section II. B., of the petitioner's brief addresses law enforcement's quest to have reasonableness measured from "their eyes only." (Pet. Br. 18). The Solicitor General cites *United States v. Knapp*, 1 F.3d 1026, 1030 (10th Cir. 1993) for the proposition that the "critical issue is whether the officers were constructively refused admittance under §3109 by waiting ten to twelve seconds without receiving a response." Again, the Solicitor General wants this Court to give the police carte blanche on what is reasonable for purposes of the Fourth Amendment. The test is, and must remain, is what is reasonable under a totality of the circumstances. If Mr. Banks is the sole occupant of an apartment and is actually in the shower when the knock and announcement comes, it is not reasonable, under the Fourth Amendment, to expect he would answer the door stark naked and dripping suds, in 15 to 20 seconds or less. Homes are locations where private activities such as bathing frequently occur. Where an officer has no exigent circumstances, there is no refusal, and seeks to search a home where there is only one known occupant, the time allowed for a response should be greater under Fourth Amendment considerations.

In Section II C of the petitioner's brief, the Solicitor General asserts that the need to consider damage to property interferes with "the proper execution of warrants" (Pet. Br. 20). The argument is that the "Guidelines" cited in *Banks* constitute irrelevant factors in light of the *Ramirez* case. The Solicitor General points to factors it approves of which tend to increase the delay between announcement and entry, late night searches and times when "the occupant is in an unusual location inside the dwelling" or the dwelling is "unusually

large" (Pet. Br. 20). The facts in *Banks* are that he lives in a twenty four town, he is the sole occupant of a dwelling and at any given time, he may be involved in private activities, such as bathing, showering or sleeping. Of course, these are not factors the Solicitor General cites as requiring a need for additional delays.

There is a discussion of cases and circumstances (exigent circumstances) which "truncate" the delay period made by the Solicitor General (Pet. Br. 20). The Solicitor General concludes the "Guidelines" which focus on destruction of property "adds nothing to the balance" of determining the proper period of delay. In defense of the Ninth Circuit Court of Appeals' "Guidelines," it is clear that they were created to give a meaningful constraint on the power of the police to forcibly enter homes. The Ninth Circuit court focused on law enforcement's factual justification for a destruction of property. One of the chief purposes of the knock and announce rule is to prevent the unnecessary destruction of the habitation. This was one of the chief reasons that Parliament passed a knock and announce statute in the year 1275, and it still is a core consideration under Title 18 U.S.C. §3109, and the Fourth Amendment. This is the reasoning behind requiring a higher showing of need for the destruction of the door or window of a home.

In Section III of the petitioner's brief, it is asserted that the 15 to 20 second wait between the knock and announcement and the forcible entry was reasonable (Pet. Br. 22). As justification for this assertion the Solicitor General cites *United States v. Lucht*, 18 F.3d 541 (8th Cir. 1994). In *Lucht*, the police executed numerous search warrants in a large scale drug investigation. Several search warrants were executed without any knock and announcement due to the existence of exigent circumstances. (See *Lucht*,18 F.3d at 549). One

home that was searched was small (the Volkir and Rumsey residence). The two occupants were awake and "the possibility was slight that those within did not hear or could not have responded promptly." *Id*. at 549. There is no mention in *Lucht* of the occupants taking a shower. Further, where there is more than one occupant, it is unlikely they will be showering together, thus rendering it unreasonable to expect that an occupant could respond in 20 seconds or less. It is worth noting that the Ninth Circuit addressed a very similar fact pattern knock and announce case decided *after Banks*. This case is *United States v. Chavez-Miranda*, 306 F.3d 973 (9th Cir. 2002). In *Chavez-Miranda*, the DEA executed a search warrant after making controlled buys. The search warrant execution occurred at 6:15 p.m. on a small two bedroom apartment less than 800 square feet in area. The officer there conducted the knock and announcement in both English and Spanish. No response to the announcement was forthcoming. After 20 to 30 seconds the door was forced open. The Ninth Circuit noted the similarities between the *Banks* case, and its fact pattern in *Chavez-Miranda* 306 F.3d 973 at 980-81. In *Chavez-Miranda* the court noted:

> We note that there are a number of similarities between *Banks* and this case. In both cases the apartments were small and the narcotics warrants were being executed at a time when one would reasonably expect the residents to be awake. In addition, in both cases the police did not hear any noise from inside the apartments suggesting that they had been heard but were being refused admittance, and no exigent circumstances present.

Despite these similarities in the *Chavez-Miranda* case the district court's denial of the suppression motion was affirmed. The Ninth Circuit distinguished *Chavez-Miranda* from *Banks*

because there were at least three known occupants in the small apartment. The police also had specific knowledge of the apartment layout and size. In *Banks*, the police did not know if anyone was home. Lastly, the court in *Chavez-Miranda* reasoned that "even if one of the three individuals inside the apartment was in the bathroom or otherwise indisposed, one of the others should have been available to respond." (306 F.3d at 981). This same distinction from the *Banks* case exists in both *Lucht* and *Chavez-Miranda*. *Chavez-Miranda* reveals that *Banks* has not created a "rigid rule" or fixed time on how much pause is a reasonable period under the totality of the circumstances.

The next case cited by the petitioner is *United States v. Spriggs*, 996 F.2d 320 (D.C. Cir. 1993) (Pet. Br. 13). In *Spriggs*, the DEA executed a search warrant at 7:45 a.m. on a weekday. The agents waited approximately 15 seconds between the knock and announcement before forcing the door open. The Court of Appeals for the District of Columbia noted that when the door was forced open, Spriggs and his wife were found coming out of the bedroom door some 25 to 35 feet away from the point of entry. *Spriggs*, 996 F.2d at 322. There is no mention of Mr. Spriggs being "indisposed" although he initially challenged the search on the basis of a single knock and announcement being unlikely to be heard in the morning. Again, there were two occupants in *Spriggs*, unlike *Banks*. In *Banks* there was uncontroverted evidence that he was in the shower when the knock and announcement occurred. The prosecution in *Banks*, argued, at the district court level, that the shower prevented him from hearing the knock and announcement. The District of Columbia Circuit could have well decided the *Banks* case in the same fashion as the Ninth Circuit given its recognition: "The time that section 3109 requires officers to wait before they may construe no response as a denial of admittance depends largely on the

factual determinations made by the trial court." *Spriggs*, 996 F.2d at 322. The *Spriggs* court noted that in *Griffin v. United States*, 618 A.2d 114 (D.C. App. 1992), a 30 second delay was found insufficient under the knock and announcement requirement, because the search was conducted at 1:30 a.m., and it was unreasonable to think the occupants were awake and able to respond promptly.

The next case cited by petitioner is the Fifth Circuit Case, *United States v. Jones*, 133 F.3d 358 (5th Cir. 1998) (Pet. Br. 14). In *Jones*, the police executed a search warrant after pausing 15 to 20 seconds after the knock and announcement. The facts recounted in the *Jones* case are scant to say the least. Mr. Jones argued that 15 to 20 seconds is not a reasonable period to expect an occupant to respond to "a potentially unexpected announcement." While it is somewhat speculative, one would suspect that had Mr. Jones been the sole occupant and been indisposed for some reason, these facts should have merited mention. In *Jones*, the Fifth Circuit found a 15 to 20 second wait (under a common-law knock and announcement rule) sufficient time given the danger in drug cases of destruction of evidence. *Jones*, 133 F.3d at 361-362. The record is barren of any particularized facts justifying this fear. The *Jones* court did note: "It is possible that a delay in a particular case might be too short to imply refusal of admittance under section 3109, but would be reasonable for the Fourth Amendment . . ." *Jones* 133 F.3d at 361. The Fifth Circuit in *Jones* recognized that a time frame greater than 15 to 20 seconds might be necessary under Title 18 U.S.C. §3109, which is the provision applicable to analysis under the *Banks* case.

The next case cited by petitioner is *United States v. Garcia*, 983 F.2d 1160 (1st Cir. 1993) (Pet. Br. 14). In *Garcia*, police officers obtained a state search warrant after

having made a controlled buy. The officers went to the apartment and knocked and announced their presence. They waited ten seconds and after hearing no response made a forcible entry. When the officers burst through the door they saw the defendants and a woman holding a child in the front room watching television. *Garcia*, 983 F.2d at 1168. The court in *Garcia* focused primarily on the easily hidden or destroyable nature of the evidence as justifying the short pause. The facts in *Garcia* indicate that the officers were aware of the immediate presence of the occupants given that they were watching television just behind the closed door, and the failure to respond quickly gave rise to an inference of refusal. Although this was not specifically addressed in the court's analysis, it does however, provide some factual justification for the short delay between announcement and entry. The facts specific to the *Banks* case were not the facts before the *Garcia* court.

The petitioner cites the case of *United States v. Gatewood*, 60 F.3d 248 (6th Cir. 1995) to argue that the *Banks* decision conflicts with other circuit courts (Pet. Br. 14). In *Gatewood*, the police officers executed a search warrant by knocking and announcing. A video tape of the incident revealed that the occupants unlocked the door and opened it after ten seconds. There was no forcible entry in the case. The *Gatewood* case is a knock and admittance case. The *Gatewood* court, despite the clear evidence of admittance, alternatively concluded had a forcible entry occurred, the delay was reasonable. 60 F.3d at 250-51. In contrasting *Gatewood* with *Banks*, had respondent actually answered the door, undoubtedly, there would have been a different result in the Ninth Circuit.

The petitioner refers to the case of *United States v. Markling*, 7 F.3d 1309 (7th Cir. 1993), as a case which is at odds with the *Banks* majority opinion (Pet. Br. 14). In

Markling, the police executed a search warrant on a motel room as part of a drug investigation. The police, prior to executing the search warrant, observed Mr. Markling return to his motel room about 5 p.m. Thereafter, two suspected drug buyers went to the motel room and after six minutes they departed. The two were stopped, searched and two bags of cocaine base were recovered from their persons. One of the drug buyers advised that Mr. Markling was "extremely paranoid" and would "flush any other drugs in the room down the toilet if he became suspicious." *Markling*, 7 F.3d at 1312. At about 7 p.m. the police executed the search warrant through a knock and announcement at an adjoining room door, they waited seven seconds, and after hearing no response they made a forcible entry. They discovered Mr. Markling in a fetal position on the bathroom floor. *Id*. The obvious difference in facts between the *Banks* case and *Markling* is the particularized knowledge from the officers investigation that Mr. Markling was highly likely to destroy evidence. This case presents exigent circumstances which were not present in the *Banks* case. Obviously, most, if not all, motel rooms are significantly smaller than two bedroom apartments. The officers heard no noise which might make the announcement difficult to hear. Under these different facts the Seventh Circuit found that it was reasonable for the officers to conclude after a seven second lapse Mr. Markling "was not going to answer the door." *Markling*, 7 F.3d at 1318.

Petitioner next cites *United States v. Goodson*, 165 F.3d 610 (8th Cir. 1999) as another example of how *Banks* is at odds with other circuit courts (Pet. Br. 14). The *Goodson* case involved the search of a one story ranch home. The police officers, executing a search warrant for drugs at 1:44 a.m., knocked twice and announced their presence (and presumably their purpose). *Goodson* 165 F.3d at 614. In

Goodson, the officers were concerned for officer safety because the suspect had a violent criminal history for assault with a deadly weapon. The officer, after waiting 20 seconds for a response, forced entry because he feared for officer safety and was concerned about destruction of evidence. This case involves exigent circumstances. Here, the forcible entry after a 20 second delay was upheld because there was a particularized concern for officer safety. In *Banks*, the officers had no known violent criminal history of the suspect which would give rise to reasonable suspicion that a greater risk to officer safety existed. These important facts are different between the two cases and can account for the differing results under the totality of the circumstance's test.

Another case cited by the petitioner as indicative of the majority opinion in *Banks* as being out of conformity with other circuit courts is *United States v. Jenkins*, 175 F.3d 1208 (10th Cir. 1999). (Pet Br. 25). In *Jenkins*, the police obtained a search warrant as part of a narcotics investigation. The search warrant was authorized to search the residence of the co-defendant Monika Payne, the girlfriend of Mr. Jenkins. Mr. Jenkins had a child with Ms. Payne and she regularly resided at the house. *Id*. *Jenkins* involved a search executed at 10 a.m. In *Jenkins*, the police were aware that there were multiple occupants in the home. The surveillance established that although the residence was Ms. Payne's, Mr. Jenkins was regularly present. *Jenkins*, 175 F.3d at 1216. The total time between the initial knock and announce and the application of force on the inner door, was 14 to 20 seconds. *Jenkins*, 175 F.3d at 1211. When the officers entered the home they found Mr. Jenkins' girlfriend, Ms. Payne, near the front door. Mr. Jenkins and his daughter were in a bedroom where they were laying on the bed. *Jenkins*, 175 F.3d at 1211. Mr. Jenkins contended the police department had a ten second wait policy before force would be applied after an announcement.

Jenkins, 175 F.3d at 1212. The Tenth Circuit noted that the record below did establish that the Wichita police department trains its officers to wait ten seconds after knocking and announcing before forcibly entering a residence "which apparently does not vary according to the size of the premises to be searched." 175 F.3d at 1214. The Tenth Circuit noted "such an inflexible policy clearly would violate the knock-and-announce standard." c.f. *United States v. Ward*, 171 F.3d 188 (4th Cir. 1999) (stating that a purported sixty second FBI policy would be troublesome under section 3109 in light of rule that amount of time officers must wait varies with exigencies of each case). The *Jenkins* court expressed "grave concerns" over the rigid rule of the Wichita Police Department's "10 second" policy. *Jenkins*, 175 F.3d at 1214-15. The *Jenkins* court noted that "compliance with the knock-and-announce component of the Fourth Amendment reasonableness inquiry must be evaluated on a fact dependent, case by case basis." 175 F.3d at 1214. The *Jenkins* court noted in reviewing the relevant case law that "the prospect of utilizing these cases as guideposts is appealing, a bright line rule for determining how much time is enough is inappropriate." 175 F.3d at 1213. The *Jenkins* court sustained the forcible entry into the home after a wait of 14 to 20 seconds. It noted that the police knocked and announced twice. Further, the *Jenkins* court noted that the warrant was executed in the middle of the day when "'most people are awake and engaged in everyday activities.'" 175 F.3d at 1215 c.f., *United States v. Spikes*, 158 F.3d 913, at 927 (6th Cir. 1998). The distinguishing facts between *Banks* and *Jenkins*, are that the officers in *Jenkins* believed that there were multiple occupants at the residence where, as in *Banks*, the officers were aware of only one occupant, and did not know whether he was even home when the warrant was executed. Further, in the *Jenkins*' case, because of multiple occupants, it was unlikely that if one person was "indisposed" that the

other occupants would be unable to respond in the 14 to 20 second time frame. The Ninth Circuit's approach in *Banks* was the application of the totality of the circumstances test. *Banks*, in the majority opinion, concluded that under the unique facts of that case, it was unreasonable to infer a refusal in 15 to 20 seconds, where the sole occupant was indisposed taking a shower. Apparently, petitioner wants this Court to announce a rigid rule that 15 to 20 seconds constitutes sufficient time to infer a refusal under the knock and announcement statute. This would virtually eliminate the Court's supervisory role in a crucial area of the Fourth Amendment. The adoption of a rigid rule of "20 seconds" would short circuit Fourth Amendment reasonableness inquiries.

C. The Suppression of Evidence in *Banks*, Vindicates Fundamental Fourth Amendment Protection Against Invasions of Privacy.

The petitioner asserts that "even if the officers had waited longer, respondent still would not have heard them" and answered the door. (Pet. Br. 26). The argument is essentially that the forcible entry would have inevitably been made anyway (albeit at a later point in time) so that there was "no harm and no foul." The petitioner then contends the sanction of suppression is in effect a disproportional punishment on society's interest in effective law enforcement. (Pet. Br. 15-17). The petitioner never raised this issue below. The general practice of this Court is not to consider matters not raised below, unless they be deemed plain error.

Petitioner cites *United States v. Espinosa*, 256 F.3d 718 at 725 (7th Cir. 2001) for the proposition that "the application of the exclusionary rule should be limited only to those instances where the constitutional violation has caused actual

harm . . ." Yet, Respondent's Fourth Amendment privacy interests *were* harmed. He was confronted with armed strangers bursting into his home while he stumbled naked, wet and in fear for his life.

In *Miller v. United States*, 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed. 2d 1332 (1958), police officers went to Mr. Miller's home to arrest him for narcotics violations. The officers knocked and said "Police," but did not indicate they had an arrest warrant. Mr. Miller then tried to shut the door and they forced entry. Inside, narcotics were seized incident to arrest. The one issue on appeal was the officer's failure to announce his purpose before entry pursuant to Title 18 U.S.C. §3109. In determining the failure to announce the officer's purpose prior to forcible entry was a violation of §3109, Justice Brennan, speaking for this Court stated:

> We are duly mindful of the reliance that society must place for achieving law and order upon the enforcing agencies of the criminal law. But insistence on observance by law officers of traditional fair procedural requirements is, from the long point of view, best calculated to contribute to that end. However, much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness. The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application. Congress, codifying a tradition embedded in Anglo-American law, has declared in §3109 the reverence of the law for the individual's right of privacy in his house. Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house.

Miller, 357 U.S. at 313. Although it will never be known for sure, had the officers in *Banks* paused just a bit longer, it might have afforded respondent the chance to have met the intruders with the small dignity of a towel. It is just this sort of privacy interest which is at the very core of the Fourth Amendment. Respondent denies petitioner's assertion that there was no causal relationship between the violation of the Fourth Amendment and his privacy interests. (Pet. Br. 25).

Lastly, the Solicitor General argues that the inevitable discovery rule or independent source doctrine should apply to the fruits of the search in *Banks*. The reasoning is that a search warrant was properly issued therefore the search was inevitable (Pet. Br. 27-29). This logic would remove most, if not all, knock and announce violations from judicial scrutiny. It would reward the violators of the knock and announce rule's long standing constraints on forcible invasions of the home. The Sixth Circuit, in *United States v. Dice*, 200 F.3d 978, 985 (6th Cir. 2000) made an outright rejection of the inevitable discovery doctrine exception where knock and announce violations occurred. In *Dice*, that court noted that there was no evidence that a second, independent investigation would have led to the evidence. In *Dice*, as in *Banks* the officers executing a search warrant in a drug investigation announced their purpose, but waited "a few" seconds before forcing entry. No exigent circumstances were present. In *Dice*, the Defendant, who was in the kitchen, heard no announcement, but rather his dogs barking loudly as officers crashed through his door.

In *Dice*, 200 F.3d 978 at 983, the Sixth Circuit found that the knock and announce rule requires "officers wait a 'reasonable' period of time after a knock before physically forcing their way into a residence." [c.f. *United States v. Finch*, 998 F.2d 349 at 354 (6th Cir. 1993)]. The *Dice* court correctly noted that the subsequent search and seizure was a direct result of the "exploitation of [the initial] illegality." (c.f. *Segura v. United States*, 468 U.S. 796, 804, 82 L.Ed2d 599, 104 S.Ct. 3380 (1984). The *Dice* court also reasoned that the exclusionary rule's exception the "independent and lawful source" doctrine should only apply where the possession of evidence is gained from a source wholly independent of the constitutional violation. *Id.* 200 F.3d at 984. This ruling makes fundamental sense that the government "not profit" from its illegal activity. *Id.*

The independent source doctrine/inevitable discovery doctrine has no application here. There is no independent investigatory source which would have inevitably led to the evidence seized in *Banks*. The entry was tainted by illegality, and the closely connected fruits of the search were properly suppressed.

CONCLUSION

Based upon the foregoing, the judgment of the court of appeals should be affirmed.

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Respectfully submitted,

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